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SUSHOVAN HUSSAIN

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

15 SUSHOVAN HUSSAIN,

16 Defendant.
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Case No. 3:16-cr-00462-CRB

**DEFENDANT'S RESPONSE TO THE
COURT'S REVISIONS TO JURY
INSTRUCTIONS (DKT NO. 362)**

Judge: Hon. Charles R. Breyer

1 Defendant Sushovan Hussain submits the following comments and suggested revisions to
2 the Court's proposed jury instructions filed at Docket No. 362.

3 Mr. Hussain objects to the Court's instruction on "Wire Fraud—Victim's Conduct." Dkt
4 No. 362-1 at 23. Evidence "regarding Hewlett Packard's internal processes in deciding whether
5 to purchase Autonomy" is relevant not only to materiality, but also to whether Mr. Hussain's
6 statements or omissions were false or misleading, and to whether he acted in good faith. The jury
7 cannot determine, for instance, whether omissions were made or answers were "misleading"
8 unless they know what HP wanted (or wanted not) to see. That is why evidence about HP's
9 conduct during due diligence, including about its "internal processes in deciding whether to
10 purchase Autonomy," tends to prove or disprove whether Mr. Hussain's representations were
11 false, whether they were made in good-faith, *and* whether they were material.

12 The instruction may also confuse the jury. Mr. Hussain has not argued that HP was
13 negligent during due diligence; he has argued that HP did not care about certain information.
14 Even as to the information that HP did *not* seek, Mr. Hussain has not cast that choice as an issue
15 of negligence or carelessness. Quite the opposite: he elicited testimony from KPMG employee
16 Andy Gersh that HP's due diligence process was deliberate and customary. *See* Tr. 4601:14–
17 4602:18.

18 In short, Mr. Hussain opposes the instruction in its entirety. If the Court is nevertheless
19 inclined to give an instruction on this issue, Mr. Hussain respectfully requests that the Court adopt
20 the revised version attached hereto. It removes ambiguity regarding HP's "internal processes" by
21 referring to HP's "process for deciding whether to purchase Autonomy." It also makes clear that
22 evidence about what HP said and did is relevant to assessing whether the alleged misstatements or
23 omissions were intentionally false or misleading.

24 With respect to the wire fraud instruction, Dkt. No. 362-1 at 19–20, Mr. Hussain objects
25 to including the phrase "participated in" on line 7. That language does not appear in the
26 indictment.

27 Mr. Hussain proposes that instruction 5.9 include a reference to "auditors." Throughout
28 the trial, Deloitte employees have been referred to as "auditors," not accountants. A proposal

1 reflecting this revision appears below.

2 As a general matter, Mr. Hussain prefers his previously proposed versions of the
3 instructions, *see* ECF No. 184, but understands the Court's rulings.

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5 Respectfully submitted,

6 Dated: April 20, 2018

KEKER, VAN NEST & PETERS LLP

7 By: /s/ John W. Keker

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1 # **WIRE FRAUD—VICTIM’S CONDUCT (showing edits)**

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3 You have heard evidence regarding Hewlett Packard’s ~~internal~~ processes ~~infor~~ deciding

4 whether to purchase Autonomy. You are to consider this evidence ~~only~~ to the extent that it helps

5 you determine whether the statements made or facts omitted as part of the alleged scheme were

6 intentionally false or misleading. You may also consider this evidence to the extent that it helps

7 you determine whether the statements made or facts omitted as part of the alleged scheme were

8 material; that is, whether they had a natural tendency to influence, or were capable of influencing,

9 a person to part with money or property (see p. 19). If you find that the ~~eseis~~ elements ~~ha~~ves been

10 met, then whether there were additional things Hewlett Packard could have done to avoid being

11 impacted by the alleged misstatements and/or omissions is irrelevant to your verdict.

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1 # **WIRE FRAUD—VICTIM’S CONDUCT (clean version)**

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3 You have heard evidence regarding Hewlett Packard’s process for deciding whether to

4 purchase Autonomy. You are to consider this evidence to the extent that it helps you determine

5 whether the statements made or facts omitted as part of the alleged scheme were intentionally

6 false or misleading. You may also consider this evidence to the extent that it helps you determine

7 whether the statements made or facts omitted as part of the alleged scheme were material; that is,

8 whether they had a natural tendency to influence, or were capable of influencing, a person to part

9 with money or property (see p. 19). If you find that these elements have been met, then whether

10 there were additional things Hewlett Packard could have done to avoid being impacted by the

11 alleged misstatements and/or omissions is irrelevant to your verdict.

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5.9 RELIANCE ON PROFESSIONAL ADVICE (showing edits)

With respect to Counts Two through Sixteen, one element that the government must prove beyond a reasonable doubt is that the defendant acted with the intent to defraud. Evidence that the defendant in good faith followed the advice of auditors who are qualified accountants~~s~~ may be inconsistent with the intent to defraud. For there to be a good faith reliance on the advice of an accountant, the defendant, before acting, must have made full and truthful disclosure of all material facts to an accountant and received the accountant's advice as to the specific course of conduct that was followed. In addition, the Defendant's reliance on the accountant's recommended course of conduct or advice must have been reasonable, given the Defendant's education, experience, and knowledge.

5.9 RELIANCE ON PROFESSIONAL ADVICE (clean version)

With respect to Counts Two through Sixteen, one element that the government must prove beyond a reasonable doubt is that the defendant acted with the intent to defraud. Evidence that the defendant in good faith followed the advice of auditors who are qualified accountants may be inconsistent with the intent to defraud. For there to be a good faith reliance on the advice of an accountant, the defendant, before acting, must have made full and truthful disclosure of all material facts to an accountant and received the accountant's advice as to the specific course of conduct that was followed. In addition, the Defendant's reliance on the accountant's recommended course of conduct or advice must have been reasonable, given the Defendant's education, experience, and knowledge.